IN THE

Supreme Court of the United States

October Term, 1978.

No. 78-1410

ALAN R. HELDON,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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COMMONWEALTH OF PENNSYLVANIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

ALAN R. HELDON, your Petitioner, respectfully prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Pennsylvania, entered in the above-entitled matter on December 14, 1978.

OPINIONS BELOW.

On December 14, 1978, the Supreme Court of Pennsylvania denied the Petition for Allowance in an unsigned *per curiam* Order which has not been officially reported (Appendix A, *infra*, p. A1), thereby leaving in effect the unsigned *per curiam* Order and judgment of the Superior Court, entered October 26, 1977. The Superior Court's unsigned Order and Opinion (Appendix B, *infra*, p. A2), which was officially reported in — Pa. Sup. —, 379 A. 2d 590, affirmed the judgment of conviction and sen-

tence imposed on February 29, 1976 by the Court of Common Pleas of Lackawanna County. The trial judge, sitting with three other judges of the Lackawanna County Court *en banc*, filed an Opinion on December 10, 1975 in support of their denial of post trial motions; that Opinion (Appendix C, *infra*, pp. A3-A17) has never been officially reported.

JURISDICTION.

The Order of the Supreme Court of Pennsylvania (Appendix A, *infra*, p. A1) denying the Petition for Allowance of Appeal, was entered on December 14, 1978. This Court's jurisdiction is invoked under 28 U. S. C. § 1257(3).

QUESTION PRESENTED.

Where trial counsel failed to file a pre-trial motion to dismiss the charges against Petitioner under the Pennsylvania Rule of Criminal Procedure requiring trial within 180 days, even though there had been an inexcusable delay in bringing Petitioner to trial of more than 224 days, has not Petitioner been deprived of the effective representation of counsel guaranteed by the Sixth and Fourteenth Amendments?

CONSTITUTIONAL PROVISIONS AND RULE OF CRIMINAL PROCEDURE INVOLVED.

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> ". . . nor shall any state deprive any person of life, liberty or property without due process of law; . . . ."

Rule 1100 of the Pennsylvania Rules of Criminal Procedure, in effect during the period involved in this case,[1] provided that:

> **Rule 1100. Prompt Trial**
>
> (a) (1) Trial in a court case in which a written complaint is filed against the defendant after June 30, 1973 but before July 1, 1974 shall commence no later than two hundred seventy (270) days from the date on which the complaint is filed.
>
> (2) Trial in a court case in which a written complaint is filed against the defendant after June 30, 1974 shall commence no later than one hundred eighty (180) days from the date on which the complaint is filed.
>
> (b) For the purpose of this Rule, trial shall be deemed to commence on the date the trial judge calls the case to trial.
>
> (c) At any time prior to the expiration of the period for commencement of trial, the attorney for the Commonwealth may apply to the court for an order extending the time for commencement of trial. A copy of such application shall be served upon the defendant through his attorney, if any, and the defendant shall also have the right to be heard thereon.

1. Paragraph (e) of this Rule was amended June 28, 1976, effective July 1, 1976, but does not affect this case.

Such application shall be granted only if trial cannot be commenced within the prescribed period despite due diligence by the Commonwealth. Any order granting such application shall specify the date or period within which trial shall be commenced.

(d) In determining the period for commencement of trial, there shall be excluded therefrom such period of delay at any stage of the proceedings as results from:

(1) the unavailability of the defendant or his attorney;

(2) any continuance in excess of thirty (30) days granted at the request of the defendant or his attorney, provided that only the period beyond the thirtieth (30th) day shall be so excluded.

(e) A new trial shall commence within a period of one hundred and twenty (120) days after the entry of an order by the trial court or an appellate court granting a new trial.

(f) At any time before trial, the defendant or his attorney may apply to the court for an order dismissing the charges with prejudice on the ground that this Rule has been violated. A copy of such application shall be served upon the attorney for the Commonwealth, who shall also have the right to be heard thereon. Any order granting such application shall dismiss the charges with prejudice and discharge the defendant.

(g) Nothing in this Rule shall be construed to modify any time limit contained in any statute of limitations.

STATEMENT OF THE CASE.

Competence of trial counsel is a matter of deep concern not only to this Court, but to all responsible members of the bench, the bar, law schools, and the public. Many responsible spokesmen have been openly critical of the effectiveness of a large percentage of trial counsel, particularly in the representation of defendants in criminal cases where fundamental rights guaranteed by the Sixth and Fourteenth Amendments are involved.

In this case, we have a classic example of failure by trial counsel to make a simple pre-trial motion which would have almost certainly terminated the case against his client. He failed to file the motion, he failed to raise the issue on post-verdict motion or on appeal to the Pennsylvania Superior Court. Yet after new counsel was obtained and raised the issue of ineffective representation to the Supreme Court of Pennsylvania, the Pennsylvania Supreme Court permitted the guilty verdict to stand. This cannot be what the Sixth and Fourteenth Amendments intended, and cannot be consistent with the forces seeking improvement of the quality of representation in our courts.

The facts of the alleged conspiracy resulting in Petitioner's arrest and conviction are of no concern to the narrow issue here raised in this Petition for Writ of Certiorari, and are set forth in the trial court's opinion (Appendix C, *infra*, pp. A3-A17). It is sufficient for purpose of this Petition to note that Petitioner and other defendants were arrested in Moosic, Pennsylvania, in Lackawanna County, on August 21, 1974 in connection with an alleged conspiracy to possess with intent to deliver phencyclidine (commonly known at PCP) [2] to undercover Pennsylvania

2. Phencyclidine is a controlled substance under Schedule III of the *Controlled Substance, Drug, Device, and Cosmetic Act*, 35 Pa. C. S. A. § 180-101, *et seq.*

State Police Officers. A written Complaint was filed the same day, but trial did not commence before a jury in the Court of Common Pleas of Lackawanna County, Pennsylvania until April 2, 1975. The Petitioner was found guilty of criminal conspiracy in violation of 18 Pa. C. S. A. § 903, but was acquitted of possession of a small amount of marijuana. Post-verdict motions were filed in which Petitioner argued that the trial court erred in refusing to allow defense counsel proper latitude in the cross-examination of an alleged co-conspirator who testified against him; they were heard by the Court of Common Pleas *en banc* and on December 10, 1975, the trial judge filed an opinion for the court denying the motion (Appendix C, *infra*, pp. A3-A17).

On February 26, 1976, Petitioner was sentenced to imprisonment for two to four years. Petitioner filed a timely appeal to the Superior Court of Pennsylvania, raising the sole issue of the lower court's refusal to allow Petitioner proper latitude in cross-examining Commonwealth witnesses at trial. The Superior Court of Pennsylvania affirmed judgment on October 26, 1977, in an opinionless *per curiam* order (Appendix B, *infra*, p. A2).

Petitioner's counsel during the pre-trial proceedings, trial, post-verdict motions and direct appeal to the Superior Court of Pennsylvania was discharged and replaced by present counsel, who was granted leave on April 7, 1978, by the Supreme Court of Pennsylvania, to file a Petition for Allowance of Appeal [3] Nunc Pro Tunc. In said Petition for Allowance of Appeal the primary issue raised was the

3. A Petition for Allowance of Appeal to the Pennsylvania Supreme Court is analogous to a Petition for Writ of Certiorari to the United States Supreme Court. The grant of such a Petition to enable further appellate review is discretionary, and will be allowed only when there are special and important reasons therefor. Pa. R. App. Pro. 1114.

ineffective assistance of prior counsel. This Petition for Allowance of Appeal was denied by the Pennsylvania Supreme Court on December 14, 1978. Upon denial of said Petition for Allowance of Appeal, Petitioner had exhausted all state avenues of appellate relief.

REASONS FOR GRANTING THE WRIT.

1. Only This Court Can Supply a Clear and Uniform Standard in Determining Whether a Defendant in a Criminal Case Has Been Denied the Effective Assistance of Counsel Guaranteed by the Sixth and Fourteenth Amendments.

As stated by a well known authority on the criminal procedure:

> "The standard for determining instances of constitutionally unacceptable ineffectiveness is a major unresolved issue. Although in any rapidly expanding area of the law transitional periods in the courts' conceptualization and definition of workable standards are expected, the law on the standards for measuring ineffective assistance of counsel, as well as the source of those standards, remains in an especially troublesome and shifting transitional state." Strazzella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems,* 19 ARIZ. L. REV. 443, 446 (1978).

The Pennsylvania courts have adopted a standard for determining whether representation by counsel measures up to the constitutional requirements of the Fourteenth Amendment, which incorporate the provisions of the Sixth Amendment. As enunciated in *Commonwealth ex rel. Washington v. Maroney,* 427 Pa. 599, 604, 235 A. 2d 349, 352 (1967), the standard applied by the Pennsylvania courts is:

> "[C]ounsel's assistance is deemed constitutionally effective once we are able to conclude that the principal course chosen had *some reasonable basis designed to effectuate his client's interests.*" (Emphasis supplied.)

Also see *Commonwealth v. Nole,* 461 Pa. 314, 316 A. 2d 302 (1975); *Commonwealth v. Goosby,* 461 Pa. 229, 336 A. 2d 260 (1975); *Commonwealth v. Rice,* 456 Pa. 90, 318 A. 2d 705 (1974); *Commonwealth v. Harrison,* 228 Pa. Super. 42, 323 A. 2d 848 (1974). However, this standard differs from that established in other state and federal courts.

The federal courts have articulated the Sixth Amendment requirements under a variety of phrases. The legal standard for ascertaining whether a defendant has been denied the constitutionally guaranteed right to effective assistance of counsel is enunciated, in several circuits, as an inquiry of whether counsel's representation is such as to shock the conscience of the court, and to make the trial a farce and mockery of justice. See *United States v. Bubar,* 567 F. 2d 192 (2nd Cir.), cert. denied, 434 U. S. 872 (1977); *Rickenbacker v. Warden,* 550 F. 2d 62, 65 (2d Cir. 1975); *United States v. Wright,* 573 F. 2d 681 (1st Cir.), cert. denied, 98 S. Ct. 2857 (1978); *United States v. Ramirez,* 535 F. 2d 125, 129 (1st Cir. 1976). The same standard, articulated somewhat differently by the Tenth Circuit, is whether counsel's representation is perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference or preparation. *United States v. Riebald,* 557 F. 2d 697 (10th Cir.), cert. denied, 434 U. S. 860 (1977); *Gillihan v. Rodriguez,* 551 F. 2d 1182, 1187 (10th Cir. 1977).

More than half of the circuits, however, have expressly rejected this mockery of justice approach, some adopting a standard requiring counsel to be reasonably likely to render and rendering reasonably effective assistance. See *Gaines v. Hopper,* 575 F. 2d 1147 (5th Cir. 1978); *United States v. Fesell,* 531 F. 2d 1275, 1278 (5th Cir. 1976); *United States v. DeCoster,* 487 F. 2d 1197,

1202 (D. C. Cir. 1973); *Beasley v. United States,* 491 F. 2d 687 (6th Cir. 1974). In *Beasley,* the court stated that:

> "Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law. . . ." Id., at 696.

The Eighth Circuit articulation is whether counsel exercised the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances. *Pinnell v. Cauthron,* 540 F. 2d 938 (8th Cir. 1976); *United States v. Easter,* 539 F. 2d 663, 665-666 (8th Cir. 1976).

The impetus for making a shift from the "subjective" mockery of justice standard to a more objective standard came from *McMann v. Richardson,* 397 U. S. 759 (1970), where this Court, in determining the validity of guilty pleas entered on the advice of counsel who erroneously thought that their confessions would be admissible, stated that a defendant is entitled to legal assistance "within the range of competency demanded of attorneys in criminal cases".

Following the *McMann* shift of philosophy calling for a more stringent and objective standard for determining effective assistance of counsel, several Circuits have expressed their own formulae. The Fourth Circuit, in *Marzullo v. Maryland,* 561 F. 2d 540 (4th Cir. 1977), cert. denied, 56 L. ed. 2d 394 (1978), adopted the *McMann* test and commented:

> "A convict generally must establish that his counsel's error was so flagrant that a court can conclude that it resulted from negligence or ignorance rather than from informed, professional deliberation."

In the Third Circuit, the test for constitutional adequacy of legal services is whether counsel exercised the

customary skill and knowledge which normally prevails at the time and place. *Boyer v. Patton,* 579 F. 2d 284 (3rd Cir. 1978); *Moore v. United States,* 432 F. 2d 730 (3rd Cir. 1970). In the Seventh Circuit, the standard is "assistance which meets a minimum standard of professional representation." *United States ex rel. William v. Toomey,* 510 F. 2d 635, 641 (7th Cir. 1975). The Ninth Circuit is internally divided. *Compare Saunders v. Eynans,* No. 75-3485 (9th Cir. April 18, 1977), with *Cooper v. Fitzharris,* 551 F. 2d 1162 (9th Cir. 1977).

Not only are the circuits in discord over what legal standard to apply in determining whether the quality of counsel's representation was constitutionally sufficient, but there is also considerable conflict concerning the other subsidiary issues, such as whether the same standard for ineffective assistance of counsel should apply to privately retained as well as to court appointed counsel, whether the same standard should apply in collateral relief as on direct appeal, and whether the denial of effective assistance of counsel can be harmless error.

This Court has failed to adopt or to approve any specific standard. The language of this Court in *McMann, supra,* in 1970, was not directed at a charge that counsel had been ineffective. On the contrary, the issue before the Court was whether and to what extent an otherwise valid guilty plea may be impeached in collateral proceedings by assertions or proof that the plea was motivated by a prior coerced confession. In discussing the factors that enter a defendant's decision to a plea of guilty, the Court noted that a plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession. The Court concluded that whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought ad-

missible in evidence depends initially, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases. It was in this context that the Court stated: "On the one hand, uncertainly is inherent in predicting Court decisions; but on the other hand defendants facing felony charges are entitled to the effective assistance of competent counsel."

Just this past term, when the Court had an opportunity to resolve the issue of what minimum standard of competence must be displayed by an attorney for a criminal defendant in order to satisfy the Sixth Amendment's requirement of effective assistance of counsel, this Court denied certiorari despite the vigorous dissent of Justices White and Rehnquist. *Maryland v. Marzullo, supra,* 56 L. ed. 2d 364 (1978).

In the case at bar, this Court again has the opportunity of bringing order to the "disarray" left by the varying standards applied by the State Appellate Courts and the Federal Courts of Appeals, some of which are mentioned by Justices White and Rehnquist.

2. Under the Standards for Determining Effective Assistance of Counsel Announced by the Majority of Federal Courts of Appeals, as Well as Many States, Including Pennsylvania, Petitioner Is Entitled to a New Trial Because His Counsel Committed Serious Error in Failing to Object to Trial Under Pennsylvania Prompt Trial Rule.

Pursuant to a mandate from the Supreme Court of Pennsylvania [4] the Criminal Procedural Rules Committee

4. In *Commonwealth v. Hamilton,* 449 Pa. 279, 297 A. 2d 127 (1972), a unanimous Pennsylvania Supreme Court stated that:

"Therefore, in order to more effectively protect the right of criminal defendants to a speedy trial and also to help eliminate the backlog in criminal cases in the courts of Pennsylvania we deem it expedient to formulate a rule of criminal procedure fixing a maximum time limit in which individuals accused of crime shall be brought to trial, in the future, in this Commonwealth, in line with this conclusion, we will immediately refer the matter to the Criminal Procedures Rules Committee for study and recommendation."

recommended, and the Supreme Court of Pennsylvania adopted a prompt trial Rule [5] which requires that trials in felony cases [6] should commence within 180 days of the filing of a Complaint. Certain delays, caused by the unavailability of defendant or his counsel or defense continuances in excess of thirty days, may be excluded in computing the 180 day period. See *Commonwealth v. Shelton,* 469 Pa. 8, 364 A. 2d 694 (1976). In addition, if the Commonwealth, despite exercise of due diligence, cannot commence the trial within the prescribed period, it may apply for and obtain an order extending the time for commencing trial; however, it must make that request within the prescribed period. See *Commonwealth v. O'Shea,* 465 Pa. 491, 350 A. 2d 872 (1976); *Commonwealth v. Shelton, supra.* Since the complaint was filed on August 21, 1974 and trial did not commence until April 2, 1975, a lapse of 224 days, if at any time after the 180th day the defense counsel had filed a motion to dismiss the charges, the court would have had to determine whether any of the delay in commencing trial was attributable to the defense and thus excludible from the computation. The record here showed that the case had been first listed for trial on January 28, 1975, but was continued because defendant's counsel had other trials scheduled during that trial. Under *Commonwealth v. Wade,* 475 Pa. 339, 380

4. (Cont'd.)

we deem it expedient to formulate a rule of criminal procedure fixing a maximum time limit in which individuals accused of crime shall be brought to trial, in the future, in this Commonwealth, in line with this conclusion, we will immediately refer the matter to the Criminal Procedures Rules Committee for study and recommendation."

5. See pp. 3-4, *supra.*

6. Rule 6013 provides for similar but shorter time limits in misdemeanor cases tried in the Municipal Court of Philadelphia. Pa. R. Crim. P. 6013.

A. 2d 782 (1977), a maximum of thirty-four days of that continuance could be excludible. Thus, the trial would have had to commence by March 24, 1975, and the start of trial on April 2, 1975 was eight days too late. However, no Petition to Dismiss was filed.

Even the Pennsylvania courts have customarily ruled that failure of trial counsel to assert in timely fashion a violation of this Rule 1100 right to a prompt trial constitutes ineffective assistance of counsel. See *Commonwealth v. Dozier*, — Pa. Super. —, 392 A. 2d 837 (1978); *Commonwealth v. Byrd*, 250 Pa. Super. 250, 378 A. 2d 921 (1977); *Commonwealth v. Weber*, — Pa. Super. —, 389 A. 2d 1107 (1978); also see *Commonwealth v. Roundtree*, 469 Pa. 244, 364 A. 2d 1359 (1976).

Not only did trial counsel here fail to file a timely petition, but he failed to raise the issue on post-trial motions or direct appeal to the Superior Court of Pennsylvania. Thus, the trial court made no reference to the issue in its opinion, and the Superior Court in its opinionless *per curiam* order affirming the conviction also made no reference to the issue. Trial counsel was thereafter replaced and present counsel, in his Petition for Allowance of Appeal filed in the Supreme Court of Pennsylvania, raised as the primary issue the question of ineffective assistance of counsel arising *inter alia* from counsel's failure to apply for a pre-trial order to dismiss the charges. Under Pennsylvania decisional law, ". . . ineffectiveness of prior counsel must be raised as an issue at the earliest stage in the proceedings at which the counsel whose effectiveness is being challenged no longer represents the defendant." *Commonwealth v. Hubbard*, 472 Pa. 259, 372 A. 2d 687 (1977); *Commonwealth v. Smallwood*, 456 Pa. 392, 350 A. 2d 822 (1976); *Commonwealth v. Carter*, 463 Pa. 310, 344 A. 2d 846 (1975); *Commonwealth v. Dancer*, 460 Pa. 95, 331 A. 2d 435 (1975).

Nonetheless, in the case at bar, the Supreme Court of Pennsylvania refused to review the case, and thus has prevented this Court or any other court from determining whether it applied a proper standard in determining effectiveness of trial counsel, or has abdicated its responsibility to do so.

CONCLUSION.

This Petition raises the important question, the subject of much confusion among the circuits and states, of whether it is enough to establish ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments, where the record contains serious reversible error material to the right of the Commonwealth to try the petitioner which has been waived by failure of counsel to make appropriate objection. As Professor Strazzella pointed out:

> "The proliferation of ineffective assistance standards in the absence of a definitive Supreme Court resolution of a federal standard provokes more than abstract debate about the most appropriate standard; it could also lead to concrete frictions. For example, the disparity in standards creates the possibility that state courts and federal courts having jurisdiction within the same geographical area may have different interpretations of federal constitutional levels of counsel effectiveness. . . ." Strazzella, *supra*, 19 ARIZ. L. REV. at 453.

In the case at bar, the Pennsylvania Supreme Court has abdicated its responsibility to apply any standard, or has failed to disclose what standard it did apply in refusing to review the conviction, despite the raising of the ineffectiveness of prior counsel issue at the first opportunity available to new counsel in the case.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted to determine whether the Pennsylvania Courts have ignored or improperly interpreted the Sixth Amendment requirements of effective assistance of counsel in violation of the Sixth and Fourteenth Amendments.

Respectfully submitted,

STANFORD SHMUKLER,
Counsel for Petitioner.

Dated: March 14, 1979

APPENDIX A.

(Letterhead of)
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

December 26, 1978

Stanford Shmukler, Esq.
12th Floor—1314 Chestnut Street
Phila., Pa. 19107

In re: Commonwealth v. Alan R. Heldon,
Petitioner.
No. 3276 Allocatur Docket

Dear Mr. Shmukler:

This is to advise you that on December 14, 1978 the Supreme Court entered its Order denying the Petition for Allowance of Appeal in the above-captioned matter.

Very truly yours,

/s/ SALLY MRVOS (ld)
Sally Mrvos
Prothonotary

SM:mb
CC: Amil Minora, Esq.

APPENDIX B.

IN THE
SUPERIOR COURT OF PENNSYLVANIA

No. 1175. OCTOBER TERM, 1976.

COMMONWEALTH OF PENNSYLVANIA

v.

ALAN R. HELDON

Judgment of sentence affirmed, and defendant directed to appear in Court below when called, in order to be committed by that Court to serve any portion of the sentence which had not been completed at the time the appeal was made a supersedeas.

PER CURIAM:

Order entered.

Date: October 26, 1977.

APPENDIX C.*

IN THE
COURT OF COMMON PLEAS
OF LACKAWANNA COUNTY

CRIMINAL DIVISION

No. 1578(a)(b) of 1974.

COMMONWEALTH OF PENNSYLVANIA

v.

ALAN R. HELDON

BEFORE COURT EN BANC: ROBINSON, P.J., CONABOY, KOSIK & WALSH, J.J.

OPINION: WALSH, *J.*

This matter is before the Court on Defendant's Motion for a New Trial and Arrest of Judgment. The Defendant was charged with criminal conspiracy to commit the crime of possession of a controlled substance with intent to deliver and also possession of a small amount of marijuana under separate indictments. A two day trial was held April 2 and 3, 1975 and the Jury returned a verdict of acquittal on the possession of the small amount

* The following Opinion contains numerous typographical and grammatical errors, particularly in the portions of transcript quoted. It is reprinted here exactly as distributed to the parties, without editing or corrections.

of marijuana charge, and guilty of the criminal conspiracy charge. The reason advanced for a Motion for Arrest of Judgment was that the evidence was insufficient to sustain the verdict. The reasons advanced for a New Trial were: 1. verdict contrary to evidence; 2. verdict contrary to weight of evidence; 3. verdict contrary to law; 4. verdict contrary to charge of Court; and 5. Court erred in ruling on Defendant's objections.

The Defendant only argued reason No. 5, that the Court erred in refusing to allow Defendant proper latitude in cross-examination of co-conspirator.

However, the Court considered all reasons advanced and finds that there was sufficient evidence to sustain the verdict and that the verdict was not contrary to the law or to the Charge of the Court or the evidence or weight thereof.

The facts of the case are as follows:

On August 17, 1974, Trooper Nicholas Genova was working an undercover narcotics investigation in the City of Scranton. On that date he met with one, Sebastian Gittuso, and arranged to purchase four pounds of phencycldyne, known at PCP, a controlled substance for the price of $8,400. (N. T. 8). Gittuso, in turn contacted one John B. Corcoran, who arranged through a person in the Philadelphia area to provide him with the PCP. On Tuesday, August 20, 1974, Gittuso again met Trooper Genvoa at which time Genova showed him $8,000 in cash to verify that he could complete the deal. (N. T. 8). Arrangements were then made to have the 4 pounds of PCP delivered to Genova at the Rocky Glen Market on Birney Avenue in Moosic, Pennsylvania, the following evening (N. T. 9).

John B. Corcoran, a co-conspirator, testified that he was contacted by Gittuso for the purpose of obtaining

PCP. Corcoran in turn contacted a friend in Philadelphia to have the PCP delivered to him (N. T. 27). On the evening of August 21, 1974 at about 6:00 P. M. Corcoran's Philadelphia friend met him at the Skyliner Diner in Dupont, Pennsylvania and directed Corcoran to a parking lot in Wilkes-Barre near the Wyoming Valley Mall (N. T. 29). Corcoran waited at the Mall for a blue Torino to pull up driven by the Defendant Heldon. Heldon and Corcoran then each drove back to the Skyliner Diner where Heldon handed Corcoran a cloth bag or purse through Heldon's car window containing 3 jars of PCP. (N. T. 30). Corcoran then went to Gittuso's car, (a brown Capri) placed the bag therein and drove with Gittuso to the Rocky Glen Market. He was followed by Heldon who in turn was followed by Corcoran's brother (N. T. 31). The three cars then pulled into the Glen Market parking lot. Gittuso parked his car alongside the State Trooper's car. Heldon parked to the far end of the lot in the same line of cars as the Trooper and Gittuso, Kerry Corcoran parked to the rear of the lot near the highway. (N. T. 32).

Once the cars were parked, Gittuso took the bag containing the PCP out of his car and went into the State Police car where one of the occupants, also an undercover agent began weighing the substance. (N. T. 10, 64). Trooper Genova then got out of the State Police car and opened the trunk which was the prearranged signal for the state police raid to commence. (N. T. 14). The Defendant was then arrested along with Corcoran and Gittuso.

Corcoran and Gittuso both testified that they were each to get $1,800 of the $8,400 and that the balance was supposed to have been given to Heldon at the parking lot (N. T. 35, 65). The substance contained in all three jars was analyzed by Criminalist Peter Petrushka of the Wyoming Crime Laboratory and found to contain the controlled substance pehncycldyne (N. T. 134).

In the instant case, Defendant was charged with violating Section 903(a)(1) and (2) of the Crimes Code, Act of 1972, December 6, P. L. —, No. 334, Sec. 1, eff. June 6, 1973. Section 903(a) (18 C. P. S. A. Sec. 903(a) provides in pertinent part as follows:

> "A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:
>
> (1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
>
> (2) agrees to aid such other person or persons in the planning or commission or such crime or of an attempt or solicitation to commit such crime.

The Crimes Code further provides as to the scope of the conspiratorial relationship that:

> "If a person guilty of conspiracy, as defined by subsection (a) of this section, knows that a person with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiracy with such other person or persons, to commit such crime whether or not he knows their identity." (18 C. P. S. A., Sec. 903(b).)
>
> Also, the Crimes Code requires that an overt act in pursuance of the conspiracy by alleged and proved to have been done by the person charged. (18 C. P. S. A., Sec. 903(e)).

Once a verdict of guilty is returned, the test applied to determining the sufficiency of the evidence irrespective

of whether it is direct or circumstantial, is whether, accepting as true all of the evidence favorable to the prosecution, that evidence is sufficient in law to prove beyond a reasonable doubt that the accused is guilty of the crime of which he has been convicted. *Commonwealth v. Ried,* 448 Pa. 288, 292 (1972). *Commonwealth v. Lyons,* 219 Pa. Super, 20 (1971). The crutial inquiry is to determine whether, on the whole record, a finder of fact could reasonably have found that all elements of the crime charged had been proven beyond a reasonable doubt. *Commonwealth v. Williams,* 450 Pa. 158, 159 (1973).

Based on the foregoing facts and the law, the Court concludes the Jury was warranted in finding the Defendant guilty beyond a reasonable doubt on the crime charged.

In regard to Reason No. 5, that the Court erred in refusing to allow Defendant proper latitude in cross-examination of the co-conspirator, the Court also finds this is without merit.

Defendant cites a sustained objection by the Commonwealth on Page 21 of the record. The Defendant claims he was trying to lay a foundation through the cross-examination of the Trooper that an accomplice Gittuso would have a motive to lie when he took the stand because the Trooper had arrested the accomplice and was holding charges against him. However, all this information was ellicited by cross-examination of the Witness before this objection was made and sustained. On Page 20, the Trooper stated that Gittuso was arrested by him for sale of drugs and that Gittuso delt in drugs. The objection that was sustained, was what county the charges were pending in. Even though the Witness answered, and there was no motion to strike the answer, the Court stated in sustaining the objection that it failed to see how

the county the charges were pending was relevant and added if the Attorney wished to ask relevant questions he could proceed. The Attorney then did proceed to question the Trooper on page 22 asking were these criminal proceedings pending or disposed of. The witness answered, "pending." During this cross-examination of the same witness, answers were elicited that the co-conspirator had two separate charges pending against him, one for a sale in July and one for the same incident that the Defendant was involved in, and that none of these charges had been disposed of. Also that the Trooper had no conversation with the co-conspirator Gittuso concerning his (Gittuso's) testimony in this case. There was, therefore, no limitations of the cross-examination of this witness on relevant information concerning the motivation of Gittuso to testify.

Other examples cited by the Defendant are found beginning in the middle of page 38 where Defendant was cross-examining John B. Corcoran as follows:

Page 38 "Q. Have you ever been arrested for selling drugs previous to this particular incident in August? A. yes, sir. Q. And was that in connection with possession of drugs or the sale of drugs? A. Sales. Q. Who did you sell drugs to at that time? Mr. Gazda: We're going to object, Your Honor. I don't see how this is relevant. By Mr. Bonner: Q. Was it the State Police? A. I didn't sell drugs—Mr. Gazda: I object on the grounds—Witness: I was accused The Court: Just a moment. Mr. Gazda: I ob-
39 ject on the grounds of relevance. That's irrelevant and it's immaterial as to who he sold it to. Mr. Bonner: Your Honor, I think his credibility here is an issue, and I think I have the right to

go into his recrod in connection with that credibility. The Court: Well, I don't see how who he sold the drugs to is going to affect his credibility. If you want to get into a part that may affect his credibility, you may do so. Mr. Bonner: See, Your Honor, I don't know. We have a transaction between this gentleman and the State Police, and I don't know whether this was the first time or if it was only one of many other times. The Court: Well, I think the last answer was that he was arrested before for selling drugs, and I think your next question was about who he sold them to, and I don't see what that had to do with his credibility. Some part of it may have—Mr. Bonner: I'll withdraw the question. By Mr. Bonner: Q. Mr. Corcoran, when and where were you arrested? A. this time or the first time? Q. The time before. A. I was arrested at my dad's store in Pittston, and it was approximately eight months pervious. Q. Eight months previous to August of last year? A. Yes, sir. Q. And you were arrested at that time
40 for and charged with selling drugs or possession of drugs? A. Delivery. Q. Delivering drugs? A. Yes, sir. Q. Was there money involved at that time, too? A. Yes. Q. Are you telling us that the only two occasions when you have ever done this kind of thing was when you were arrested previously and this incident in August? Mr. Gazda: Your Honor, that's a little different than the question he originally asked him, and I'm going to object. He asked him about being arrested. Mr. Bonner: I think I have a right to inquiry into this gentleman's

activities in connection with drugs. I'm asking him how many other times other than the times he's been arrested, he engaged in similar type activities. Mr. Gazda: I don't see how that's relevant. The Court: I don't hee how that affects his credibility. The objection is sustained. (Exception noted for Defendant). By Mr. Bonner: Q. You were on probation, weren't you at the time of this incident? A. Yes, sir. Q. How many years probation? A. Two. Q. Before you testified here in Court today, did you have any conference with the District Attorney? A. Yes,
41 sir. Q. I can't hear you Mr. Corcoran. A. Yes, sir. Q. How many times? A. Once. Q. And did he— A. The Assistant District Attorney. Q. Yes, the Assistant District Attorney. A. Yes. Q. Well, in any event, you know the gentleman I'm talking about. A. Yes. Q. Did you go over with him your testimony? In other words did he tell you what he was going to ask you. A. Did he tell me what he was going to ask me, per se. Q. That's right? A. No, he did not. Q. Was the conference at all about what you were going to do today here testifying on the stand? A. Yes. Q. Have you had conferences with the State Police concerning your testimony here today? A. No, sir. Q. Haven't you given statements to the State Police? A. Yes, sir. Q. I can't hear you. A. Yes, sir. Q. So you're mak-
Page 42 ing a distinction between giving them statements and talking to them and the word "conferences," is that it? A. Yes, sir. Q. In fact, on September 13th of last year, you gave a statement to the State Police, correct? A. I did, sir.

Q. Did any of the officers who were involved in this case arrest you the first time you were arrested for selling drugs? Mr. Gazda: Your Honor, I think that calls for a clarification. It's a very general question, and I think it's too broad for him to be able to answer it. Mr. Bonner: He told us that he was arrested twice, once in August and once eight months pervious. Mr. Gazda: Well, what I mean though is—well, I believe the question was concerning if any of the officers that arrested him previously were involved in this case, and I think that's a little too broad of a question— The Court: Sustained on the ground of it being too broad. If you want to be a little more specific, you may. (Exception noted for the Defendant). By Mr. Bonner: Q. I take it that your arrest in August of last year was a violation of your probation. Is that correct? A. Yes, it was. Mr. Gazda: I object Your Honor. He's calling for a conclu-
43 sion on the part of the witness that he's not necessarily capable of answering. The Court: Well, he's already answered the question. By Mr. Bonner: Q. Has the Commonwealth or the District Attorney's office given you a violation of probation hearing in connection with that case that you were involved in? A. Could you repeat that? Q. Have you had any kind of a hearing for violating your probation as a result of this August incident when you were arrested for attempting to sell drugs? A. Was I brought to trial on this? Q. Were you given a hearing? A. No, sir. Q. Have you been given a hearing or a trial or anything in connection with this

case, this arrest in August? A. Not as of yet. Q. Are you in jail? A. No, I'm not. Q. Now, in connection with your testimony here today, you've talked to the State Police and they've told you that if you testified here today that they're going to be easier on you or make some kind of a deal with you, haven't they? A. I talked to the State Police on my own free will. Q. Well, part of that conversation, they've indi-
44 cated to you that they're going to recommend to the District Attorney's office that you be given some kind of a deal, that is, that you not go to jail. A. No. Mr. Gazda: Well, Your Honor, I object— The Court: Well, he's already answered and he's said "no." Mr. Gazda: "Well, I think that he's assuming a fact that's not in evidence as to what motivated him to talk to the State Police. Mr. Bonner: Well, I'm testing his bias and prejudices— The Court: Well, his answer was that he talked to them of his own free will and his last answer was that he was offered no deal. By Mr. Bonner: Q. I'm sorry but was that your last answer? A. You asked me if I would be given no jail sentence and I wasn't guaranteed anything like that. Q. I understand that you were not guaranteed anything, but it was insinuated to you by someone, either in the District Attorney's office or the State Police, that you would get some deal. Isn't that a fact? Mr. Gazda: I object to the word
Page 45 "insinuiated." By Mr. Bonner: A. Insinuated? I don't understand what you mean. The Court: Sustained. (Exception noted for the defendant). By Mr. Bonner: Q. Mr. Gittuso, aren't

you testifying here today— A. My name is Corcoran. Q. I'm sorry. Mr. Corcoran aren't you testifying here today as a result of consideration that you expect to be given to you when you come to trial? A. I'm sure that everything I do, will have a lot to do with the consideration given to me when I am on trial, as far as going to school, as far as doing anything."

On page 38 Corcoran had already admitted to being arrested on the occasion at hand and once before. Commonwealth objected to questions as to who he sold drugs to on the prior occasions. The Court sustained as irrelevant. Defendant argues the question was to test Witnesses credibility. The Court stated it did not see how who the Witness sold drugs to on another occasion had anything to do with his credibility, but he could ask questions on credibility of the Witness. The Defendant on page 39 stated he would withdraw the question. The Court fails to see how he can now complain when he withdrew the question.

On page 40 Defendant complains that he should have been allowed to question the Witness not only on previous arrests, but also on previous sales for which he was not arrested. The Court stated that how often the Witness was engaged in the sale of drugs did not affect his credibility, since only conviction, and in limited circumstances, arrest and indictments for the same crime are admissible to impeach credibility of a witness. See *Commonwealth vs. Mulroy 154 Pa. Super 410.* However, that rule never was extended to ask a Witness if he ever committed a crime for which he was not arrested.

On page 42 the same witness was asked, "Did any of the officers who were involved in this case, arrest you the

first time you were arrested for selling drugs?" This was objected to as being too broad and general. Defendant states this question also pertained to impeaching witnesses credibility. The Court sustained as being too broad and said he could ask the question if he were more specific. The evidence shows that a task force of police were used in this raid and at least seven policemen testified at the trial. How many other officers or who they were, that "were involved in this case" is conjectural.

Defendant also complains about a sustained objection on page 44 after the Witness had testified on cross-examination that he was under arrest and free on bail on these same charges, and also that he talked to the state police of his own free will and that he was not offered any deal or that the police would go easy on him, he was asked if the District Attorney or the state police "insinuated" that the Witness would be given a deal. The word insinuation was objected to and the witness stated he did not know what Defendant meant by the question. It was sustained. The Witness was then asked on page 45 if he expected some consideration for testifying for the Commonwealth and his answer was in the affirmative manner. The Court fails to see how this sustained objection is prejudicial to the Defendant.

The Defendant also complains about the sustained objection of his cross-examination of Gittuso on page 72. The Defendant had already elicited from the co-conspirator Gittuso that he was also arrested for this crime and had not come to trial, and that he planned to plead guilty and was hoping for a light sentence for testifying, but was not promised anything for pleading or testifying. On cross-examination by Defendant, Gittuso admitted he was arrested three times previous for dealing in drugs and that this sale was to Trooper Genova, a witness in the present

case, and also the amount of money he received from Trooper Genova in these sales. The question objected to was "how long have you been in the business of selling drugs." Defendant argued this was a proper impeachment question. The Court does not agree, it was not relevant or material. It is merely an attempt to have the witness say how long or how many times he committed crimes for which he was not even arrested. Compared to all the other testimony taken from this witness by cross-examination, the sustained objection did not prejudice the Defendant.

This Court agrees that an accomplices' credibility is always in issue and subject to cross-examination. However, a shot gun approach to attacking credibility is not permitted. In *Common*wealth vs. Dreibelbis, 217 Pa. Super, 257, 261 (1970) Judge Cercone quoting from Commonwealth vs. Payne, 205 Pa. 101 (1903) properly pointed out that ". . . the credibility of a witness may not be assailed by questions which develop instances of misconduct *unrelated to the issue on trial.*" In the Dreibelbis case the Court held that it was error to restrict cross-examination of a witness on his use of drugs on the day of the crime because it directly related to events upon which the Commonwealth was relying for conviction.

In the instant case, Defendant was given the opportunity and in fact did cross-examine the two accomplices as to their having been arrested for the same crime as the Defendant. (N. T. 39, 67). He also was able to point out that the accomplice, Corcoran, had been arrested on previous occasions for selling drugs, and that Gittuso was likewise (N. T. 39, 70, 71). Furthermore, Defendant was able to elicit testimony from both accomplices that they were still subject to prosecution for this offense (N. T. 45, 68, 69). The case of Commonwealth vs. Alensky 118 Pa.

Super 106 (1935) cited by Defendant in his brief is clearly distinguishable. In that case, the Defendant was not permitted to show that the witness under examination had been indicted for the same offense as the Defendant. In the instant case, not only were the jurors made aware that the accomplices' had been arrested, but were also aware they were going to plead guilty. They were further made aware that the accomplices had been arrested in the past for similar crimes.

It is this Court's contention that the trial Court properly sustained the objections. The information attempted to be elicited was clearly not relevant to the case on trial. In a previous, unrelated arrest, what county the drugs were sold in, to whom they were sold, by whom the accomplices were arrested, and for what length of time they were involved in selling drugs—all of these questions clearly had no relevance to the issue on trial. All of the relevant information such as the fact that the accomplices were arrested in the same case, and that they on previous occasions had been arrested for selling drugs, was brought out during the trial.

Pennsylvania law is clear that the trial judge is given a wide degree of discretion in the scope of cross-examination. Commonwealth vs. Marion, 213 Pa. Super 88 (1968). The Trial Judge did not abuse his discretion in the instant case. Further, a review of the testimony compels the conclusion that a searching, repetitive cross-examination of both accomplices was made by the Defendant, and no prejudicial harm resulted in sustaining the question objected to. The Defendant was given the benefit of the usual charge concerning an accomplices' testimony (N. T. 171). Also the jury had sufficient evidence before it to impeach the testimony of the accomplices if they had decided to. Clearly, the jury chose to believe the accomplices

notwithstanding their admitted participation in the crime as well as other crimes. It cannot be said, as a matter of law, that the Defendant under all of the facts of this case, was denied a fair trial.

Now, this 10 day of December, 1975, Defendant's Motion for a New Trial and Arrest of Judgment are denied.

By THE COURT:

/s/ WALSH, *J.*

For the Commonwealth: Ernest Gazda, Jr., Esq.
Assistant District Attorney

For the Defendant: John C. Bonner. Esq.
James E. O'Brien, Jr., Esq.